Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

CITY OF LITTLE ROCK,

Petitioner,

v.

CHARLES GOSS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the rough proportionality standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), extends to denials of requests for more intensive zoning and waiver of dedication of right-of-way where there are valid, nonarbitrary reasons for the denial and no showing of harm.

Whether federal courts lack jurisdiction to hear Fifth Amendment takings claims where the property owner failed to utilize available state inverse condemnation procedures.

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PETITION FOR WRIT OF CERTIORARI

The City of Little Rock respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, filed on August 10, 1998, is reported at 151 F.3d 861 (1998) and is reproduced as Appendix (App.) A. The order of the court of appeals denying rehearing and the suggestion for rehearing en banc was filed October 1, 1998 and is reproduced as App. G. The previous opinion of the court of appeals is reported at 90 F.3d 306 (1996) and is reproduced as App. B. The relevant, prior orders of the district court are unreported but are reproduced herein as App. C through F. Page references are to the version in the appendix.

JURISDICTION

The court of appeals entered its judgment on August 10, 1998 and denied rehearing and the suggestion for rehearing en banc on October 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The respondent invoked jurisdiction of the district court through the Fifth and Fourteenth Amendments of the United States Constitution pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution, which provides in part: "[N]or shall private property be taken for public use without just compensation."

The state provisions referred to are Ark. Const. Art. 2 § 22 (1874) and Ark. Code Ann. § 18-15-102 (Michie 1987). These state provisions are set out at App. H.

STATEMENT

Respondent Charles Goss applied to the City of Little Rock ("City") in 1993 for rezoning of two adjoining lots he owned that front on Stagecoach Road. The two lots, approximately 3.7 acres not counting street right-of-way, have been zoned R-2 Single Family Residential since annexation into the City in 1985.

There is a single family residence on one of the lots which is Mr. Goss' home. This use conforms with the existing residential zoning category. Record (R. 162, 244). On the other lot is a small grocery store, laundromat, two gas pumps and a car wash. These uses are nonconforming to the City's adopted land use plan. The lot with the house on it comprises at least half of the property Mr. Goss seeks to rezone to commercial zoning. (R. 61-62). Mr. Goss has been trying unsuccessfully to sell the lots since 1989. (R. 54-55).

Mr. Goss initially applied for C-4 zoning for the lots, which is the most intense commercial zoning within Little Rock. (R. 147). As a part of the rezoning application and

in accordance with City policy, City staff asked Mr. Goss to agree to dedication of certain right-of-way. (R. 159). The City establishes requirements for dedications of right-of-way for boundary street improvements. Under the plan, Stagecoach Road is classified as a principle arterial and the master street plan standard for that road is 55 feet from the centerline of the roadway. Mr. Goss claims his property extends to the centerline of Stagecoach Road; however, the existing right-of-way for Stagecoach Road is 60 feet wide, or 30 feet on either side of the centerline. (R. 244; 249-50, 252-56). Therefore, according to the master street plan, the right-of-way was insufficient by 25 feet on the side of the Goss property fronting on Stagecoach Road.

City planning staff did not support the proposed change to C-4 rezoning for the two lots because it was more intense than that specified under the land use plan. That plan categorizes the property in question as Neighborhood Commercial. (R. 146). C-1 zoning is the classification most closely associated with the land use plan designation of "Neighborhood Commercial." The C-1 Neighborhood Commercial zoning category is a more restrictive zoning classification than that of C-3 General Commercial. (R. 146-47).

When the City's Planning Commission considered the Goss rezoning issue, it had information that all the properties surrounding the Goss parcel are zoned R-2, and that the uses of the surrounding properties are as follows: to the north, vacant in part and single family in part; to the south and east, single family; and to the west, the property is vacant. (R. 149). The Planning Commission also had information that there was opposition to the

rezoning, manifested in two letters from neighboring property owners and one or two telephone calls to City staff. The information before the Planning Commission is also given to the City Board of Directors. (R. 146).

The Planning Commission heard the rezoning matter on May 24, 1993. During the Planning Commission hearing, Mr. Goss amended his application to seek C-3 General Commercial zoning for the two lots. The C-3 zoning classification allows 81 uses by right and, 24 conditional uses by permit.

The City staff recommended approval of the rezoning to C-3 of Mr. Goss' two lots. To allow a permanent and more intensive zoning classification, however, triggered the master street plan, so the condition of dedication of right-of-way was required. Although not unanimous, the Planning Commission voted to recommend approval of the amended application for C-3 rezoning to the City Board. The one commissioner who voted against recommending the rezoning did so after voicing concern that the use sought was more intense than that called for under the land use plan.

Mr. Goss wanted the more intensive zoning, but was opposed to dedicating right-of-way. After a period of City inaction on the matter, he asked that the rezoning issue be submitted to the City Board of Directors along with the issue of his request for waiver of the dedication requirement. The Board heard the matter on February 21, 1995, when the ordinance before it was to rezone the two lots to C-3 and to waive the 25 foot right-of-way dedication. App. I-1-4. At the meeting, City staff stated to the Board that they were recommending a reduction in the

total amount of dedication being requested. Pltf's Exh. 1. With that reduction, Mr. Goss would be asked to dedicate 20 feet of his property along Stagecoach Road. That 20-foot strip represents 7.7 percent of the 3.7 acres of the Goss property that is outside the existing right-of-way. (R. 244, 246). After some discussion by some of the ten directors present, (R. 232), the Board denied the request with 3 voting in favor and 7 voting against the land use change. App. I-1-3. Pltf's Exh. 1.

Despite the availability of a state court cause of action, Mr. Goss proceeded directly to federal court to file suit on March 20, 1995. The District Court found he had not been harmed by the City's actions and granted the City's motion to dismiss for failure to state a claim. App. C-4-10. The District Court also denied reconsideration of the matter. App. D-1-3. On appeal, the Eighth Circuit found that the allegation of facts might entitle relief and reversed and remanded with instructions to the district court to apply the tests set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) to determine if the dedication requirement amounted to a taking. App. B-8; App. A-2-3. The Eighth Circuit never addressed the jurisdictional issue.

The District Court believed it could not consider jurisdiction or removal so, after trial, the District Court concluded that the required nexus between the dedication sought by the City and the impact of the proposed rezoning was proven, but that the City did not establish rough proportionality. App. E-6-10. The court ruled that the City was obligated to rezone Mr. Goss' property without a dedication of right-of-way. Still, the district court found that Mr. Goss had not shown any harm and determined he was not entitled to damages or attorney's

fees. App. E-10-12. Alternatively, the court concluded that even if Mr. Goss had been harmed by the City, he was estopped from recovering damages because of his concealment of relevant information when the City considered his rezoning application. App. E-11; App. E-13; App. F-2-6.

The City appealed on grounds of lack of subject matter jurisdiction, that the *Dolan* rough proportionality analysis was inapplicable to denials of rezoning where no dedication was imposed and no harm was shown, and on the basis that there was no Fifth or Fourteenth Amendment taking because the City's action was not arbitrary but served legitimate safety, health and welfare interests. Mr. Goss cross-appealed on the issues of damages and attorney's fees.

The Eighth Circuit, while noting the City raised a jurisdictional argument, dismissed it with no explanation of its reasoning. App. A-3. It also summarily rejected the City's argument that *Dolan* should not apply to denials of rezoning, saying that argument was foreclosed by its previous opinion. App. A-3. The appeals court affirmed the district court's conclusion that a nexus had been shown between the dedication and the City's interest in preventing increased traffic that could result from rezoning the property as commercial, but that the City was unable to show rough proportionality. While agreeing with the City that it had a legitimate reason for demanding the dedication, the Eighth Circuit determined that a taking had occurred.

The court, however, reversed the district court's determination that the City was required to rezone the

Goss property because the City could pursue its legitimate interest in declining the rezoning. App. A-6. The court affirmed the denial of damages but reversed on the question of attorney's fees, stating Mr. Goss was entitled to a partial award for his limited success in this case that he could have explicitly brought under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE PETITION

I. The scope of heightened scrutiny of exactions has been improperly expanded to denials of rezoning applications involving a condition of dedication, despite valid, non-arbitrary reasons for government denial and no showing of harm.

This Court should grant the writ in order to declare the scope of Fifth Amendment takings scrunity in rezoning cases. This Court established a heightened scrutiny in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Court's Fifth Amendment takings analysis in both cases concerned exactions imposed by local governments on property owners as a condition of approved individual development permit applications. Through its decision in this case, the Eighth Circuit has expanded the scope of heightened scrutiny in Fifth Amendment Takings cases.

A. The expansion of heightened scrutiny is unwarranted under existing precedents.

The *Nollan/Dolan* heightened scrutiny standard should have little or no relevance to cases without actual adjudicatory exactions. There is no indication from a reading of the two cases that the broader reach adopted

by the Eighth Circuit was intended by this Court. To the contrary, the language of the two cases implies a strict limitation to the narrow circumstance where government has compelled dedications of property as a condition of approving an individual development project in an approved zoning classification, as opposed to the denial of a more intensive rezoning. The *Nollan* Court determined that *permit* conditions that exact an interest in real property resemble physical takings. *Nollan*, 483 U.S. at 831. Justice Scalia made a distinction between use restrictions and required dedications of possessory interests:

> We are inclined to be particularly careful about the adjective ["substantial"] where the *actual conveyance* of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Id., 483 U.S. at 841 (emphasis added). *Dolan* resolved the question left open in *Nollan* of "what is the required degree of connection between the exactions *imposed* by the city and the projected impacts of the proposed development." *Dolan*, 512 U.S. at 377 (emphasis added). In *Dolan*, Chief Justice Rehnquist emphasized that the condition imposed compromised Ms. Dolan's "right to exclude others" which is " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Dolan*, 512 U.S. at 384, *quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also, Dolan*, 512 U.S. at 393.

Other courts have interpreted the reach of the *Nollan/Dolan* heightened scrutiny to be limited to the context in which there is a dedication of a possessory interest in

land required by government. In *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (challenge to a hunting regulation as a Takings), the court concluded that *Nollan* and *Dolan* were

> best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., possession of one's physical property) through a conditional permitting procedure.

Thus, heightened scrutiny appears limited to the context of development exactions where an actual physical taking or its equivalent occurs. *See, GST Tucson Lightwave, Inc. v. City of Tucson*, 949 P.2d 971, 979 (Ariz. Ct. App. 1997) (suggesting *Dolan* is limited to adjudicative decisions resulting in a physical taking or its equivalent); *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (*Dolan* not applicable where regulation did not impose obligation to deed portion of land).

The Ninth Circuit case of *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 118 S. Ct. 1359 (1998), presently under the Court's review, is a notable exception. The Ninth Circuit expanded the Takings doctrine to impose a means-ends test for all regulation of land use, including a local government's denial of an application to use property for a particular purpose. Still, *Del Monte Dunes* is a permit case as opposed to a rezoning case. In the recent case of *Eastern Enterprises v. Apfel*, Justice Kennedy cautioned that the Takings Clause should not be expanded beyond

its current applications in order to "provide[ ] some necessary predictability for governmental entities." *Eastern Enterprises*, ___ U.S. ___, 118 S. Ct. 2131, 2155 (1998) (Kennedy, J., concurring and dissenting).

The extent of the confusion about the relationships between Takings and rezoning is evident when it is remembered that the *Nollan* and *Dolan* opinions both relied on the language in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which stated: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . . " *Agins*, 447 U.S. at 260 (1980). *See, Nollan*, 483 U.S. at 834 & n.3, 841; *Dolan*, 512 U.S. at 385. The question here is whether this language in *Agins* means *"only if"* the "ordinance does not substantially advance legitimate state interests. . . . " *Id.*

The Eighth Circuit reversed the district court's earlier dismissal of Goss' case, and instructed the lower court to apply *Dolan* in determining whether the city's dedication requirement as a condition of more intensive rezoning was a Taking. In so doing, the Eighth Circuit stated that its focus in this case was on the "advancement of a legitimate state interest" test for a Taking set forth in *Agins*. App. B-4-5.

Other courts have found there is no independent means-ends test for takings. *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 261 (Wash. 1998) (alleged arbitrary and illegal denial of permit stated a claim under due process, not the Takings Clause); *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083 n.5 (R.I. 1997) (overruling

conclusion that "a regulatory taking can be compensable if the ordinance in question does not substantially advance any legitimate state interest"). Eight years after the decision in *Agins*, the Court of Claims stated that "no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988). The petitioner is aware of only one case in which a court has entered a final award of financial compensation on this theory. *See, Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 408-412 (1994). The *Nollan* and *Dolan* cases were not decided on such a basis but on the proposition that compelled dedications require more justification than regulations that restrict land use without having imposed a dedication. The analysis established by those cases requires comparison between the compelled dedication and the impacts of the proposed development and is not required when there has been no dedication imposed.

The inconsistent application in rezoning cases of this Court's precedents on Takings, by various state and federal jurisdictions then, is sufficient reason to grant the writ.

B. Broadening the scope of heightened scrutiny to denials of rezoning requires impermissible judicial speculation of local legislators' motivations and leads to the anomalous result of the finding of a taking with no showing of harm or arbitrary government action.

The *Agins* "substantially advance test" and *Dolan* heightened scrutiny should not reach taking claims arising from the mere denials of land use decisions in which a dedication is sought, if there are valid, nonarbitrary reasons for the denial. This fact is particularly true where, as here, the property owner has suffered no harm. The Eighth Circuit determined that this case presents a Takings Clause issue and that substantive due process is not involved. App. A-5. The district court specifically found that Mr. Goss suffered no harm through the actions of the City. App. E-10-12; App. F-2-3.[1] Furthermore, the Eighth Circuit agreed that the present case differs from *Nollan* and *Dolan* in this respect: *Nollan* and *Dolan* concerned the granting of the applicant's permit request subject to the unconstitutional condition, while Little Rock denied the applicant's request. App. A-6. The court described the difference as a "mere technicality" that does not save it from being a taking because the reason for the denial was that Goss would not agree to the dedication requirement. App. A-6. As such, the court found that the City's action

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[1] The only harm alleged by Mr. Goss was an inability to sell his property, which he bought in 1971 for approximately $21,000, to his son and his friend for $515,000 through an oral contract. The district court determined that the contract was unenforceable pursuant to the state statute of frauds.

amounted to a grant of the request subject to the dedication requirement. (In light of the negative vote in the Planning Commission, and other information about the impact of this rezoning on local uses, the Eighth Circuit's "legislative" condition is, to say the least, remarkable).

By treating a denial of a rezoning, where a dedication condition was considered but never imposed, as the equivalent of a dedication condition compelled after the approval of rezoning stretches the takings concept far beyond its traditional and contemporary underpinnings. If allowed to stand, this ruling allows a taking to be found for a condition that, although considered, was never imposed, where the property owner remains in the same position he was in before he made his rezoning application, where there has been no showing of harm, no taking of title, no physical occupation, no restriction on the right to exclude, no public use of private property, and no private burden.

If that is what the Court intends *Nollan/Dolan* to stand for, it should say so. If not, it should say so. Hence, these are additional reasons to grant the writ.

If denials of rezoning applications which include dedication conditions are indeed to be subject to *Nollan/Dolan* heightened scrutiny, courts will be required to determine the reason or reasons upon which each legislative decisionmaker cast his or her vote to deny. Delving into the motivations of legislative decisionmakers will require judicial speculation that is prohibited. *See, Newman v. Burgin*, 930 F.2d 955, 963 (1st Cir. 1991) (courts do not inquire into reasoning or motivation of individual

administrative decisionmakers); *City of Fairfield v. Superior Court*, 537 P.2d 375 (1975) (same). This Court has cautioned that "[i]nquiries into congressional motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). This Court has said: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986), *quoting O'Brien*, 391 U.S. at 383-84. The Eighth Circuit noted in *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 863 (8th Cir. 1994), that "[a]lthough those cases [just cited] dealt with Acts of Congress, the principle they announced is equally applicable to municipal ordinances."

The district court found that the reason the City denied Goss' rezoning request for more intensive zoning was on grounds that without the dedication of 55 feet for possible future highway expansion,[2] the City would otherwise have to pay condemnation damages. App. E-5. To reach that result required the court to speculate into the motives of each of the ten city directors voting on the rezoning and waiver of dedication. Since nothing in writing indicates the reason each voted as he or she did and since some directors did not participate in the videotaped discussion and others only asked questions, Pltf's Exh. 1,

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[2] The district court found that while the dedication initially sought was 55 feet as measured from the centerline of the existing highway, 30 feet was being used by the public and could not be utilized by Goss, making an effective dedication of 25 feet, which was later reduced by City staff to a requested dedication of 20 feet.

scrutiny of the directors' reasoning and motivations must be guesswork.

There were valid, nonarbitrary reasons for denying the commercial rezoning of the property. First, the commercial rezoning category sought was more intense than that called for in the adopted land use plan. Second, there was neighborhood opposition. Third, the surrounding area is largely residential in character and 81 commercial uses would have negatively impacted the neighborhood. Fourth, an absolute waiver of dedication would have prevented the City from obtaining any reasonable amount of right-of-way at any time in the future, including when a building permit were sought, no matter what the impact of the development. Which of these or other factors motivated the other individual legislators to vote as they did is not in the record. Had Mr. Goss accepted the condition and if the City directors had then voted in favor of the rezoning with the condition, the allegedly unconstitutional condition would have been actual rather than theoretical and Mr. Goss would have been free to challenge it in court. As it is, courts are left to speculate as to the reasons why City legislators voted down the measure.

The inquiry into legislative reasoning sanctioned by the Eighth Circuit's opinion in this case takes judicial scrutiny into a realm prohibited by the separation of powers doctrine. The court of appeals has expanded heightened scrutiny into this new, sensitive area despite serious federalism and separation of powers issues that such an expansion raises. Local land use planning "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to

its adjudication is open." *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983), *quoting Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941). This is particularly true in the area of zoning matters. The Fourth Circuit observed that: "Zoning is inescapably a political function. . . . [L]and-use decisions are a core function of local government. . . . [F]ederal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995), *quoting Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67-68 (4th Cir. 1992) (quotations omitted).

A property owner has no right to a more profitable use of his property and a land use restriction which merely deprives him of that does not effect a taking. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-38 (1978). A dedication of land, sought as a condition of rezoning to a more intensive use in accord with an adopted master street plan is equivalent to the common zoning regulations which "requir[e] subdividers to observe lot-size and set-back restrictions, and to *dedicate certain areas to public streets*" and are thus "in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting and concurring) (emphasis added).

This Court should grant the writ because, otherwise, the Eighth Circuit precedent for extending the scope of heightened scrutiny will stand; because expanding heightened scrutiny into the area of denials of rezoning where a condition of dedication was present raises an important question of federal law that has yet to be

settled by this Court; and, because the expansion raises serious federalism and separation of powers concerns that should also be considered.

II. Review of this matter is necessary to provide uniformity and certainty within federal courts concerning the jurisdictional requirements for takings claims and to avoid waste of resources.

This Court should also grant the writ on the jurisdictional issue in this lawsuit. The Court has an opportunity to promote uniformity of interpretation by the lower courts and to prevent a waste of resources in this much litigated area of the law. Justice Scalia has noted: "Nothing is more wasteful than litigation about where to litigate. . . . " *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). This Court should determine whether, owing to a lack of ripeness, federal courts have improperly taken jurisdiction over the subject matter of this lawsuit.

To establish a claim is ripe for review, a claimant must demonstrate a sufficiently concrete case or controversy and prudential considerations must justify the present exercise of judicial power. *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1272-73 (8th Cir. 1994). The concept of ripeness is especially important in challenges to land use regulations. *Id.*, 35 F.3d at 1273.

The Supreme Court's ripeness rules for takings cases were set forth in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). This Court wrote that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a

violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.*, 473 U.S. at 195. Arkansas has such a remedy through Ark. Code Ann. § 18-15-102 (Michie 1987). This statute, in conjunction with Article 2, § 22 of the Arkansas Constitution, "fully preserve[s] all the constitutional protections due [a property owner] for the public taking, injury or destruction of his property, real or personal." *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir.), *cert. denied*, 469 U.S. 857 (1984). Last year this Court addressed ripeness of an alleged regulatory taking in its decision in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). In *Suitum*, the owner of an undeveloped lot was denied permission to build on her residential property. She asserted that her takings claim under the Fifth and Fourteenth Amendments was ripe although she had made no effort to sell transferable development rights she had in the property. The Court upheld the precedent of *Williamson County*, reiterating that: "Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a taking suit in federal court, unless the State does not provide adequate remedies for obtaining compensation." *Id.*, 117 S. Ct. at 1672, n.8. While the landowner in *Suitum* proceeded to federal rather than state court, this Court noted that the Tahoe Regional Planning Agency is an interstate agency, and according to the undisputed assertion of Ms. Suitum's counsel, the agency is without provisions for paying just compensation, thus suggesting it is not subject to inverse condemnation proceedings. *Id.* Without available state court remedies, then, the *Suitum* takings

claim was properly in federal court and the result was not contrary to *Williamson County*.

A number of lower court decisions have adhered to the *Williamson County* requirements. *See, e.g., Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs,* 972 F.2d 309, 310 (10th Cir. 1992) ("Before a federal court can properly determine whether the state has violated the fifth amendment [takings clause], the aggrieved property owner must first show that the state deprived him of his property, and second, that the state refused to compensate him for his loss"); *San Remo Hotel v. City and County of San Francisco,* 145 F.3d 1095 (9th Cir. 1998) (as-applied taking challenge unripe because state procedures for obtaining compensation were not utilized).

The Eighth Circuit followed these ripeness rules. In *McKenzie v. City of White Hall,* the court said that:

> As for the second *Williamson* requirement, the plaintiff must seek compensation from the state before proceeding to federal court if adequate state procedures are available, even in a physical taking case. This is so because when the state provides an adequate process for obtaining compensation no Fifth Amendment violation occurs until compensation is denied.

McKenzie, 112 F.3d 313, 317 (8th Cir. 1997) (internal citations omitted). The court thus found the as-applied taking was not ripe. However, the *White Hall* decision was not applied in this case.

The City contends that the Respondent has not established that this matter is ripe for federal court review. It is clear that the plaintiff has the burden of proving that

jurisdiction exists. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). It is also clear that Mr. Goss brings an as-applied claim. In the Appellee's Brief p. 11, he states: "This case is neither a challenge to a land use regulation as it applies to the general population, nor is it a challenge to a statute of general application." Furthermore, Mr. Goss has not sought compensation in state court for his taking claim and has not shown that a remedy there is unavailable to him.

Although the City has continued to raise its jurisdictional question at every stage in this litigation, no opinion has squarely addressed the issue. In summarily discarding the City's ripeness and jurisdiction arguments without any explanation of its reasoning, App. A-3, the Eighth Circuit appears to reject this Court's and its own precedents. Very recently, this Court had occasion to strongly emphasize that jurisdiction is a threshold matter to be decided before questions on the merits. *Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, 118 S. Ct. 1003 (1998). The City suggests that the jurisdictional issue is appropriate for summary reversal. At a minimum, further review of this matter is warranted to maintain uniformity of federal court decisions and consistency in this area of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2652

Charles Goss, Appellee, v. City of Little Rock, Arkansas, Appellant.	* * * * * * * * *	Appeals from the United States District Court for the Eastern District of Arkansas.

No. 97-2790

Charles Goss, Appellant, v. City of Little Rock, Arkansas, Appellee.	* * * * * * * * *	

Submitted: May 11, 1998
Filed: August 10, 1998

Before BOWMAN, Chief Judge, HEANEY, and HANSEN, Circuit Judges.

BOWMAN, Chief Judge.

Charles Goss owned 3.7 acres in the city of Little Rock, Arkansas. Little Rock's zoning laws classified Goss's property as residential. In 1993, Goss filed an application requesting that the city rezone his property as commercial. Little Rock's Planning Commission recommended that the City Board of Directors approve Goss's request only if Goss would dedicate to the city 22 percent of his property to be used for the expansion of an adjacent highway. Goss did not agree to this condition, and the City Board denied his application for rezoning.

Goss then sued Little Rock in the District Court,[1] alleging that Little Rock's requirement that he dedicate to the city part of his property as a condition of the city's approving his rezoning application constituted a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article Two, § 22 of the Arkansas Constitution. The District Court dismissed Goss's suit for failure to state a claim upon which relief can be granted, and Goss appealed. In *Goss v. City of Little Rock*, 90 F.3d 306, 310 (8th Cir. 1996), we reversed the District Court. We held that, depending on the facts, Goss might be entitled to relief, and we remanded the case to the District Court for determination of whether Little Rock's dedication requirement constituted a taking. On remand, after trying the case the District Court held that the dedication requirement did constitute a taking, and

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[1] The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

the court therefore ordered Little Rock to rezone Goss's property without the dedication requirement. The District Court also held that Goss was not entitled to compensatory or punitive damages or attorney fees. Little Rock now appeals the District Court's judgment that the dedication requirement was a taking, and Goss appeals the denials of compensatory damages and attorney fees.

Little Rock makes two arguments that it made the first time this case was on appeal: that the District Court and this Court lack jurisdiction over this case and that the Supreme Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply. The time to make these arguments has come and gone. We rejected both contentions the first time Little Rock made them. Indeed, we remanded with instructions to the District Court to apply *Dolan* in determining whether the dedication requirement was a taking. *See Goss*, 90 F.3d at 309-310. Having rejected Little Rock's arguments before, we will not reconsider them now.

We turn now to the question of whether the dedication requirement constituted a taking. We begin by noting that if Little Rock had simply required Goss to grant the city part of his land, without agreeing to rezone his property in exchange, then this clearly would have been a taking. *See Goss*, 90 F.3d at 309. Little Rock, however, imposed the requirement not absolutely but rather as a condition of declining to exercise its legitimate interest in denying Goss's rezoning application. In our previous opinion, we examined the law governing such conditions. To summarize, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987), the Supreme Court held that a condition does not constitute a taking if there is a nexus

between the condition and the government's legitimate interest in preventing the proposed development. The Supreme Court refined this test in *Dolan*, holding that the government must prove that the condition bears "rough proportionality" to the likely impact of granting the applicant's request. *Dolan*, 512 U.S. at 391. In our first opinion, we instructed the District Court to apply the tests set forth in *Nollan* and *Dolan* in determining whether the dedication requirement constituted a taking. *Goss*, 90 F.3d at 309-10.

Applying *Nollan* on remand, the District Court held that there was a nexus between the dedication and the city's interest in declining to rezone Goss's property – an interest in preventing increased traffic that could result from rezoning the property as commercial. The District Court's conclusion is correct: the dedication could alleviate the problems associated with increased traffic if it were used, as planned, to expand the highway adjacent to Goss's land. Applying *Dolan*, the District Court held that Little Rock had not met its burden of proving that the dedication was roughly proportionate to the impact that the proposed rezoning would have on traffic. The court found that Little Rock's assessment of the impact of rezoning was too speculative because that assessment was based on traffic that could, as said by the city's witness, "conceivably" be generated at some unknown point in the future if a strip mall were erected on Goss's land, although there are no plans to build a strip mall on the property and there is no reason to expect one to be built. Little Rock's Appendix at 85. The District Court concluded that Little Rock had failed to comply with

Dolan's requirement that the government make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The District Court therefore held that the dedication requirement constituted a taking.

Little Rock does not respond to the District Court's conclusion that it failed to carry its burden of proving rough proportionality between the dedication and the impact of the proposed rezoning. Instead Little Rock makes several arguments that have nothing to do with rough proportionality. Perhaps Little Rock takes this course because of its belief that *Dolan* is irrelevant to this case. If so, that is unfortunate for the city because, as discussed above, the argument that *Dolan* does not apply is foreclosed by our contrary decision in the previous appeal. At any rate, Little Rock's arguments, which we will briefly discuss, do not help its case. Little Rock argues that it had a legitimate reason for demanding the dedication. This is true, but it does not prove that the legitimate reason was proportionate to the demand. Little Rock argues that the land it required Goss to dedicate is worth less than Goss maintains. Whether or not this is true, it does not show that the value of the land is proportionate to the impact that rezoning would have on traffic. Finally, Little Rock asserts that it did not violate Goss's substantive due process rights. Substantive due process, however, has nothing to do with this Takings Clause case. In sum, Little Rock has given us no reason to question the District Court's well-reasoned conclusion that the city failed to prove rough proportionality. We

therefore affirm the District Court's judgment that the dedication requirement constituted a taking.

Next we consider the question of remedy. The District Court ordered that, because the dedication requirement was a taking, Little Rock must rezone Goss's property without the requirement. We reverse this order. As discussed above, Little Rock has a legitimate interest in declining to rezone Goss's property, and the city may pursue that interest by denying Goss's rezoning application outright, as opposed to denying it because of Goss's refusal to agree to an unconstitutional condition, as the city did here.[2] *See Nollan*, 483 U.S. at 835-36 (stating that the government may deny the applicant's request outright if it has a legitimate interest in doing so). Since Little Rock may deny Goss's rezoning application outright, it may seem that we are awarding Goss a purely Pyrrhic victory. That, however, is not entirely so. Because

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[2] Little Rock argues that, because it denied Goss's rezoning application and thus did not alter the status quo ante, it cannot possibly have taken Goss's property without just compensation. We disagree. It is true that this case differs from *Nollan* and *Dolan* in that in each of those cases the government granted the applicant's request subject to the unconstitutional condition, *see Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379, whereas in this case Little Rock denied Goss's request because Goss would not agree to the condition. This distinction, however, is a mere technicality that does not save Little Rock's action from constituting a taking. What Little Rock did amounted to granting Goss's request subject to the dedication requirement. Little Rock's Planning Commission recommended that the City Board of Directors do exactly that. Then, because Goss would not agree to the condition, the City Board denied his request. In essence, this was no different from what transpired in *Nollan* and *Dolan*.

Little Rock violated Goss's constitutional right, Goss is at least potentially eligible for damages and attorney fees, the issues to which we now turn.

First Goss contends that the District Court erred in denying him compensatory damages. Goss argues that Little Rock's failure to rezone his property without the dedication requirement prevented him from selling the property, thereby costing him $265,000. As we just discussed, however, Little Rock was not legally required to rezone Goss's property. Accordingly, Goss is not entitled to damages on account of Little Rock's failure to do so. The District Court thus did not err in denying Goss compensatory damages.

As an alternative reason for affirming the District Court's denial of compensatory damages, we note that the District Court found that Goss had failed to prove that he could have sold his property had Little Rock rezoned it without the dedication requirement. That finding is not clearly erroneous. Goss maintains that he had entered into a contract to sell his property to his son and his son's business partner and that they would have closed the deal but for the city's failure to rezone the property. Goss acknowledges, however, that this purported "contract" was merely an oral agreement. Under the Arkansas Statute of Frauds, oral agreements for the sale of land are generally unenforceable. *See* Ark. Code Ann. § 4-59-101(a)(4) (Michie Replacement 1996). An oral agreement for the sale of land may be enforceable if its formation and performance are proven by clear and convincing evidence. *See Langston v. Langston*, 625 S.W.2d 554, 556 (Ark. Ct. App. 1981). While Goss presented some evidence of the agreement's formation, he presented no

evidence whatsoever that any part of the alleged agreement was enforced. Indeed, all three parties to the alleged contract testified that Goss was never paid any earnest money. Thus the District Court did not clearly err in concluding that Goss had not entered an enforceable contract to sell his property and that, accordingly, Little Rock did not prevent Goss from consummating the sale.

Goss also argues that the District Court erred in denying him attorney fees. Under 42 U.S.C. § 1988(b) (1994), district courts have discretion to award attorney fees to a prevailing party "[i]n any action or proceeding to enforce a provision of [several civil rights statutes including 42 U.S.C. § 1983 (1994)]." Section 1983 provides that a person who, acting under color of state law, violates another person's constitutional rights is liable to the person whose rights he violates. In this case Goss proved the elements of § 1983 he proved that Little Rock, acting under color of state law, violated his constitutional right not to have his property taken without just compensation. Goss, however, did not cite § 1983 in his complaint or in any argument before the District Court. Instead he cited the Constitution itself as the basis of his lawsuit. The District Court acknowledged that Goss had proven a § 1983 claim. Nevertheless, because Goss did not bring suit explicitly under § 1983, the District Court held that Goss's suit was not "a proceeding to enforce" § 1983 within the meaning of § 1988(b) and that, accordingly,

Goss was ineligible for attorney fees. We review the District Court's decision on this question of law de novo.[3]

This is the first time our Court has considered this question. We conclude that Goss's suit is a "proceeding to enforce" § 1983 within the meaning of § 1988(b). We start with the statute's language. As the Supreme Court has observed, the meaning of "a proceeding to enforce" § 1983 is unclear on its face because § 1983 does not create substantive rights that a person can "enforce" in the typical sense of the word. *See Maher v. Gagne*, 448 U.S. 122, 129 n. 11 (1980). Instead § 1983 establishes a means by which people can enforce the Constitution. It simply provides that, when a state actor violates a person's constitutional rights, that person can sue the state actor. That, of course, is exactly what Goss did. Indeed, § 1983 does nothing more than make lawsuits like this one possible. Thus Goss did enforce § 1983 in that he did precisely what it authorizes people to do.

Next we examine the legislative history. This history strongly suggests that, in enacting § 1988(b), Congress was more concerned with the substance of plaintiffs' claims than with the form in which those claims are

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[3] Ordinarily we review a district court's decision whether to award attorney fees under § 1988(b) for abuse of discretion. *See* 42 U.S.C. § 1988(b) (granting district courts discretion to award attorney fees). In this case, however, the District Court did not exercise its discretion under § 1988(b). Instead the District Court held that this case fell entirely outside the scope of § 1988(b) because Goss did not bring suit explicitly under § 1983. This is a legal determination on a question of statutory interpretation, and we therefore review it de novo.

presented. The Supreme Court has explained that Congress enacted § 1988(b) "to benefit those claiming deprivations of constitutional and civil rights." *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980). Goss is such a person. "The function of an award of attorney's fees [under § 1988(b)] is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel." *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (internal quotation marks omitted). Goss brought a "meritorious civil rights claim," although he did not cite § 1983. Furthermore, "the legislative history makes it perfectly clear that [§ 1988(b)] was intended to apply in any action for which § 1983 provides a remedy." *Maher*, 448 U.S. at 129 n. 11. This is such a case. Goss proved that Little Rock, a state actor, violated his constitutional right not to have his property taken without just compensation. Section 1983 therefore afforded him a remedy. Thus holding that Goss's action falls within the scope of § 1988(b) will further the policy underlying the statute's enactment.

Finally, our holding on this issue is consistent with decisions of the Second Circuit and the Sixth Circuit that have held that a prevailing civil rights plaintiff may recover attorney fees under § 1988(b) despite failing to plead or argue § 1983. *See Haley v. Pataki*, 106 F.3d 478, 481-82 (2d Cir. 1997); *Americans United for Separation of Church & State v. School Dist. of Grand Rapids*, 835 F.2d 627, 631 (6th Cir. 1987) ("§ 1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented."). We are also persuaded by a

case from our Circuit in which the plaintiff sought attorney fees after suing under both § 1983 and the Commerce Clause but prevailing only on the Commerce Clause claim. *See Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1141-42 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), *abrogated on a ground not relevant to this case, Dennis v. Higgins*, 498 U.S. 439, 442 (1991). We held that the plaintiff could not recover attorney fees under § 1988(b) because the plaintiff could not have prevailed under § 1983. *See id.* at 1147. More important for the present case, we also stated that "the fact that a party prevails on a ground other than § 1983 does not preclude an award of attorney's fees under § 1988. If § 1983 would have been an appropriate basis for relief, then [the plaintiff] is entitled to attorney's fees under § 1988 even though relief was actually awarded on another ground." *Id.* at 1141-42 (citing *Maher*, 448 U.S. at 132 n. 15). *Consolidated Freightways* thus lends further support to the principle that, in applying § 1988(b), we should focus on the substance rather than the form of a plaintiff's case.

For the foregoing reasons, we conclude that the District Court erred in denying Goss attorney fees on account of his failure specifically to plead or argue § 1983. This does not mean, however, that Goss is entitled to recover all his attorney fees. Because Goss did not prevail on his request that Little Rock be ordered to rezone his property without the dedication requirement or on his claims for monetary damages, he should receive only a partial award. We remand to the District Court for its determination of a reasonable award, taking into account the limited success Goss has achieved in the litigation.

In summary, we affirm the judgment of the District Court that Little Rock's refusal to rezone Goss's property unless he accepted an unconstitutional condition amounted to a taking of private property without just compensation. We reverse the District Court's order that Little Rock must rezone the property without the dedication requirement. We affirm the District Court's judgment that Goss is not entitled to compensatory damages. We reverse the District Court's denial of Goss's request for attorney fees and remand for the determination of a reasonable award.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-4070

Charles Goss, Appellant, v. City of Little Rock, Arkansas, Appellee.	* * * * * * * *	Appeal From the United States District Court for the Eastern District of Arkansas.

Submitted: May 16, 1996

Filed: July 23, 1996

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

HEANEY, Circuit Judge.

Charles Goss filed suit asserting that by conditioning its approval of plaintiff's rezoning request on his dedication of property, the City of Little Rock (Little Rock) violated the Fifth and Fourteenth Amendments to the United States Constitution and Article Two, § 22 of the Arkansas Constitution. The United States District Court dismissed the complaint. We reverse.

BACKGROUND

In September 1971, Charles Goss purchased 3.7 acres located next to a two-lane state highway in a rural, unincorporated area outside Little Rock. Goss has operated a convenience store, gas station, laundromat, and car wash on the premises ever since. In 1985, Little Rock annexed a portion of its surrounding area that included the Goss property. In accordance with the city code, the annexed area was classified by default as an "R-2" district for single-family residences. Under the city ordinances, Goss' business activity would be limited to "C-3" general commercial district zones; nevertheless, Goss was permitted to continue his operations pursuant to a nonconforming use exception.

Although Goss continues to utilize his property in the same commercial capacity in which it has been used for the past twenty years, he asserts that sale of his commercial enterprise and property is contingent on rezoning. (Jt. App. 31). In April 1993, Goss petitioned Little Rock to have his property rezoned as a "C-3" zone. In May, Little Rock's Staff and Planning Commission agreed to recommend to the Little Rock Board of Directors that the area be rezoned, but only on the condition that Goss dedicate a portion of his property to Little Rock for future expansion of the adjacent highway. The demanded dedication ran the entire length of Goss' property (633.68 feet) and 55 feet into the lot. The total acreage of the demanded dedication approximates eight-tenths of an acre, or twenty-two percent of the total property. Goss objected to the condition.

The Planning Commission finally submitted its recommendation for a conditional rezoning to the Board of Directors on February 21, 1995 along with a request by Goss to waive the dedication condition. The Planning Commission recommended that the Board deny the requested waiver. On February 21, 1995, the Board refused to rezone the property without the dedication. It reasoned that the Little Rock treasury would otherwise have to pay condemnation damages for the future road expansion. (Complaint ¶ 8).

On March 20, 1995, Goss filed suit in the United States District Court for the Eastern District of Arkansas alleging that the imposition of the dedication condition violated the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, § 22 of the Arkansas Constitution. On September 25, 1995, the district court dismissed the suit for a failure to state a claim. Goss now appeals.[1]

ANALYSIS

We review the district court's dismissal de novo. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994). In considering a motion to dismiss, the court must construe the complaint liberally and assume all factual allegations to be true. *Id.* Dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can

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[1] Appellee objects to the inclusion of certain items within the joint appendix. Appellee's motion to strike those portions is hereby denied.

prove no set of facts that would entitle relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Since the seminal case *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court has often affirmed the propriety of a state's utilization of its police powers to regulate land use. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Court has specifically upheld the use of zoning laws to effectuate such regulation. *See Village of Euclid*, 272 U.S. at 387. The Court has cautioned, however, that there are constitutional limits on the exercise of this police power: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mason*, 260 U.S. 393, 413, 416 (1922).

Rezoning decisions are vested in the discretion of municipal zoning authorities and these legislative decisions are not subject to judicial scrutiny as to their providence. *Burns v. City of Des Peres*, 534 F.2d 103, 108 (8th Cir. 1976) ("Courts are not to assume the role of a super zoning board."). Notwithstanding the admonition that courts should not reverse a zoning commission merely because a contrary result may be permissible, *id.*, courts must ensure compliance with minimal constitutional limitations. To this end, the Supreme Court has held that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins*, 447

U.S. at 260. We focus on the former: advancement of a legitimate state interest.

Little Rock contends that "the relationship between its regulatory action in denying the rezoning request and [Little Rock's] public health and safety concerns over regulating traffic that rezoning would likely entail is direct and substantial." (Appellee's Br. at 18). The Supreme Court has explicitly acknowledged the state interest in containing the effects of urbanization:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the principle of the Compensation Clause] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J. dissenting); *accord Agins*, 447 U.S. at 261 & n.8. Were Little Rock's regulatory action a simple denial of a rezoning request, we would agree. This portrayal, however, oversimplifies and mischaracterizes Little Rock's action.

The Little Rock action in question was the *conditioning* of its approval of the rezoning request on the dedication by Goss of a portion of his property. The use of conditions in conjunction with the exercise of police powers has been the subject of a great deal of judicial attention. *See, e.g., Nollan v. California Coastal Comm'n*, 425 [sic] U.S. 825 (1987); *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). This attention derives from the frank acknowledgement that states might use conditions in combination with the exercise of their discretionary power to elude the confines of the Constitution and accomplish what might otherwise be clearly impermissible.

In *Nollan v. California Coastal Commission*, the Supreme Court considered whether the California Coastal Commission could condition a rebuilding permit on the applicant's grant of a public-access easement across the property's beachfront. 425 [sic] U.S. at 834-37. The Court held that where a state could refuse an applicant's request pursuant to its police powers, it can also attach conditions to its approval so long as there is a nexus between the attached conditions and the justification for which the state might have prohibited the applicant's action. *Id.* at 836. The Court reasoned that "the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Id.* In *Nollan*, the justification for denying a rebuilding permit – protection of the ocean view – would not have been advanced by the required easement; therefore, the condition was unconstitutional. *Id.* at 841.

Like *Nollan*, if Little Rock had simply required the dedication of Goss' property, rather than conditioning a rezoning application on its grant, it would have been a taking. Thus, the question is whether the condition was in response to a legitimate concern regarding the proposed rezoning or whether Little Rock was using its police powers as leverage to extract the concession of a constitutional right – compensation for property taken.

The Court further elaborated its permissible condition analysis in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). In *Dolan*, a city planning commission granted a permit to develop the applicant's property subject to the condition that the applicant dedicate portions of her property toward the improvement of the area drainage system and a pedestrian/bicycle pathway. 114 S. Ct. at 2313. The required dedications were part of a community development code. *Id.* In contrast to *Nollan*, in *Dolan* the Court found a nexus between the legitimate state interest – commercial development resulting in more runoff and higher traffic concentrations – and the conditions imposed on the permit. In addition to the requisite nexus, the Court went on to require that the city[2] demonstrate that the degree of the extractions demanded in the condition bears "rough proportionality" to the projected

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[2] Although the property owner carries the burden of proving that the imposition of the regulatory action violates constitutional norms in cases evaluating most generally applicable zoning regulations, *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), in cases where a city makes an adjudicative decision to condition petitioner's application on an individual parcel, the burden properly rests on the city. *Dolan*, 114 S. Ct. at 2320 n.8.

impact of the applicant's request. *Id.* at 2318-20. This requirement ensures that the conditioning of a discretionary benefit does not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" in violation of the Just Compensation Clause. *Pennell*, 485 U.S. at 9 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987)).

Given that the allegation of facts might entitle relief in this case, dismissal of this action was inappropriate. The record suggests that Little Rock's staff based its condition on a concern that a different, heavy traffic-producing business could be erected on the property if rezoned.[3] The sparsity of the record, however, does not permit an inquiry by this court into the existence of the required nexus or, if a nexus exists, whether the demanded dedication bears some rough proportionality to the projected impact of the proposed rezoning. Therefore, we reverse the district court's dismissal and remand it for further proceedings consistent with this opinion.

A True copy.

Attest:
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[3] The fact that the current use of the property is "C-3" undercuts the claim that a different "C-3" business, developed in place of the present enterprise, might add to the traffic burden. *Cf. W.J. Jones Ins. Trust v. Fort Smith, Ark.*, 731 F. Supp. 912, 914 (W.D. Ark. 1990) (addition of convenience store to a gas station would have a de minimis impact on traffic burden).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHARLES GOSS, Plaintiff,	*	
vs.	*	No. LR-C-95-180
CITY OF LITTLE ROCK, Defendant.	*	

MEMORANDUM AND ORDER

(Filed Sept. 25, 1995)

This case involves a zoning dispute. The matter is before the Court on motion of the defendant, City of Little Rock ("City"), to dismiss [doc.#4]. Plaintiff Charles Goss has responded in opposition to the motion. For the reasons that follow, the Court finds that the City's motion to dismiss should be and hereby is granted.

I.

Plaintiff is the owner of real property located on Stagecoach Road, also known as State Highway No. 5, in Pulaski County, Arkansas. Plaintiff operates what he characterizes as a small commercial business on the property,[1] and apparently has done so for some twenty years.

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[1] The record does not indicate the nature of the business plaintiff is operating.

Under the City's ordinances, plaintiff's business would be classified as a commercial business appropriate for a "C-3" general commercial district zoning.

Plaintiff's property originally was in an unincorporated area of Pulaski County. In 1985 the City annexed this area, including plaintiff's property, and zoned the area as a "R-2" single family residential district. Although plaintiff's property has been zoned residential since the annexation, he has operated his business continuously since that time as a non-conforming use.

In April of 1993, plaintiff petitioned the City to have his business area rezoned to "C-3" zoning, which would be consistent with the manner in which the property was already being used. On May 24, 1993, the City, through its staff and Planning Commission, reviewed the application and agreed to recommend to the City Board of Directors that the area be rezoned to a "C-3" general commercial district. This recommendation was conditioned, however, upon the plaintiff dedicating to the City 55 feet of his property as an additional right-of-way to Highway No. 5 for future expansion.

Plaintiff objected to the required dedication and states that "for a long period of time," the City refused to submit the application to the Board of Directors without the dedication of 55 feet of his property. He states that "after a lapse of time," he requested that the application as applied for be submitted to the Board of Directors. Plaintiff's request was complied with and the application was submitted to the Board on February 21, 1995. The Planning Commission and the City's staff recommended

to the Board that the rezoning as requested in the application be approved, but that plaintiff's requested waiver of the condition requiring dedication of 55 feet of plaintiff's property for future public use as a road right-of-way be denied.

On February 21, 1995, the Board of Directors refused to rezone the property to "C-3" zoning without the dedication of the 55 feet for possible future expansion of Highway No. 5 on grounds that the City Treasury would otherwise have to pay condemnation damages. Plaintiff states the Board took this action even though there was no contemplated change of the use of his property for general commercial purposes, and there was no anticipated change that would increase traffic on Highway No. 5 as a result of the requested rezoning. Plaintiff did not pursue the matter in state court.

On March 20, 1995, plaintiff filed this lawsuit, asserting that the City's requirement of a dedication of real property as a condition of rezoning for continued use identical to the non-conforming use violates the 5th and 14th Amendments to the United States Constitution, and violates Article 2, § 22 of the Arkansas Constitution. Plaintiff seeks damages and an injunction to rezone the property in accordance with "C-3" zoning, without the dedication to the City of any property rights.

II.

In considering a motion to dismiss, the complaint should be liberally construed in the light most favorable to the plaintiff. *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). All inferences which may be drawn from the

facts alleged should be drawn in favor of the plaintiff, *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 n.3 (8th Cir. 1972), and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts thereunder which would entitle him or her to relief. *Price v. Moody*, 677 F.2d 676, 677 (8th Cir. 1982). Fed.R.Civ.P. Rule 12(b)(6) is not a device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint. *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991) (citations omitted). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims, irrespective of a judge's disbelief of a complaint's factual allegations or a judge's belief that the plaintiff cannot prove what the complaint asserts. *Id.* (citations omitted).

III.

Federal Courts are not boards of zoning appeals. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994). Zoning disputes are state law questions that raise federal constitutional claims only in "truly egregious and extraordinary cases." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992). The Court has carefully considered the matter and concludes this is not one of those cases.

Plaintiff does not allege a diminution in economically viable use of his property or that the City is preventing him from using his property in the manner in which it has always been used. Indeed, plaintiff admits that

despite the City's denial of his rezoning application, he continues to use his property in the same manner as before, and the City acknowledges that plaintiff may continue to operate his business as a nonconforming use.

While it is true that the business cannot be changed or expanded under its present nonconforming use, plaintiff admits "there is no contemplated future use of the Plaintiff's property which changes its present and past use," and he states that "the use will not change under the present circumstances until there is destruction of the premises, or a purchaser wishes to buy the commercial property at commercial values for a similar use to which it has been used for twenty years." Plaintiff's Brief in Support of Response to City's Motion to dismiss, at 7. Thus, notwithstanding plaintiff's concern that without the requested rezoning his property is less marketable, he has not yet suffered a loss as a result of the City's denial of his rezoning application.[2]

Even if the City's denial of his rezoning application constitutes a taking, it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the constitution so long as there exists an adequate mechanism for obtaining compensation. *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir.) (citations omitted), *cert. denied*, 469 U.S. 857 (1984). Here, the plaintiff clearly possesses an adequate and meaningful remedy in the form of an action in state court

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[2] Plaintiff does not allege that he is contemplating selling his property or that he has attempted to sell his property but is unable to find a buyer because of the City's refusal to rezone his property.

for inverse condemnation. Article 2, § 22 of the Arkansas Constitution guarantees just compensation for private property appropriated or damaged for public use by governmental entities. In addition, Ark. Code Ann. § 18-15-102 establishes the measure of recovery for real or personal property so taken or damages and grants a cause of action for recovery of such amounts. These Arkansas state law provisions fully preserve all the constitutional protections due plaintiff for any public taking, injury or destruction of his property, *Collier*, 733 F.2d at 1316, and precludes a finding that any taking of plaintiff's property is in violation of a right, privilege or immunity secured by the Constitution or laws of the United States. *Id.* at 1317.

Plaintiff cites *William J. (Jack) Jones Ins. Tr. v. City of Fort Smith, Ark.*, 731 F.Supp. 912 (W.D.Ark. 1990) ("*Jones*"), in support of his claim. In that case, the owner of a gas station applied to the City of Fort Smith for permission to build a convenience store to be associated with a gas station that was already being operated on the premises. City officials responded that under the ordinances of the City they could not give such permission unless he granted the City an expanded right-of-way along the relevant property for street purposes. The owner refused to make such a grant and filed suit in federal court under 42 U.S.C. § 1983 to enjoin application of the ordinances. Following a hearing, then-District Judge Morris S. Arnold held that the City's denial of a permit to build a convenience store unless it were granted an expanded right-of-way for street purposes was a taking in violation of the Fifth Amendment. Judge Arnold concluded that the City failed to show that the

condition which it wished to impose was reasonably related to the public need or burden that the new construction would create or contribute (such as increased traffic), and that without such a showing, the condition which the City was attaching to the building permit was "simple extortion." *Jones*, 731 F.Supp. at 914.

The Court finds plaintiff's reliance on *Jones* to be misplaced. The plaintiff in *Jones* was prevented from building a structure on his property and, thus, from enjoying the use of his property,[3] while the plaintiff in this case, by his own admission, is continuing to enjoy the full use of his property. Unlike the situation in *Jones*, this is not one of those cases in which the government is placing such a condition or restriction on the use of property that it constitutes a taking. The *Jones* case does not afford plaintiff relief.

To the extent plaintiff is asserting a substantive due process claim, he must "establish that the government action complained of is 'truly irrational", that is, 'something more than . . . arbitrary, capricious, or in violation of state law.' " *Anderson v. Douglas County*, 4 F.3d 574 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1059 (1994); *Chesterfield*, 963 F.2d 1102. To illustrate this heightened standard for substantive due process claims, the *Chesterfield* and *Anderson* courts gave as an example of such irrationality a zoning ordinance applying only to persons whose names begin with a letter in the first half of the alphabet. In addition, the Court in *Chesterfield* quoted with approval

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[3] Of course, the right to build on one's own land "is an ordinary element of a property interest." *River Park*, 23 F.3d at 166.

the following passage from a First Circuit decision, *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982):

> Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of [plaintiff's] characterizations of it and defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by [plaintiff], as well as other cases, all suggest that the conventional planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus, or the like – which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate. A federal court, after all, "should not . . . sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12, 94 S.Ct. 1536, 1542, 39 L.Ed.2d [797] (1974) (Marshall, J., dissenting). *Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has often been stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution."

Crocker v. Hakes, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam).

Id. 963 F.2d at 1104 (emphasis in original).

The Court went on to conclude, citing several holdings, that "the theory of substantive due process is properly reserved for truly egregious and extraordinary cases . . . ," and that it could "see no reason to apply these holdings to a land-use dispute." *Chesterfield*, 963 F.2d at 1105. The Court further stated that its decision "would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith . . . [a] bad-faith violation of state law remains only a violation of state law." *Id.*

In this case, accepting plaintiff's allegations to be true – that the City has unlawfully conditioned the rezoning of his property on the dedication of certain property rights – such an act was neither egregious nor irrational enough to violate plaintiff's federal rights to substantive due process. *Cf. Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (finding no substantive due process claim and stating that questions relating to zoning authority under municipal and state laws are not federal questions and are better left to the state courts to review); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991) (noting that "whether under a due process or equal protection theory, departures from administrative procedures established under state law or the denial of a permit based upon reasons illegitimate under state law do not normally amount to a violation of a developer's

federal constitutional rights"), *cited with approval in Chesterfield*, 963 F.2d at 1104.[4]

In sum, the Court grants the City's motion to dismiss [doc.#4]. Plaintiff's remedy for the refusal of the City to unconditionally rezone his property, if any, is in state court.

IT IS SO ORDERED this 25th day of September 1995.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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AND/OR 79(a) FRCP
ON 9/26/95 BY V.T.

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[4] Nor does plaintiff state a procedural due process claim. "[S]cant process is all that is 'due' in zoning cases." *River Park*, 23 F.3d at 167. Despite vague references to the amount of time it took to have his application for rezoning submitted to the City Board of Directors, plaintiff does not allege any specific irregularities in the manner in which his application was processed that would give rise to a procedural due process claim.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHARLES GOSS,	*	
	*	
Plaintiff,	*	
vs.	*	No. LR-C-95-180
	*	
CITY OF LITTLE ROCK,	*	
	*	
Defendant.	*	

ORDER

(Filed Oct 25, 1995)

By Memorandum and Order dated September 25, 1995, the Court granted the motion of the defendant, City of Little Rock ("City"), to dismiss [doc.#4]. In so ruling, the Court noted that plaintiff's remedy for the refusal of the City to unconditionally rezone his property, if any, is in state court. The matter is again before the Court on motion of the plaintiff to alter judgment [doc.#12]. The City has responded in opposition to the motion. Having considered the matter, the Court finds that plaintiff's motion should be and hereby is denied.

Plaintiff argues that this Court "fail[ed] to follow its duty" with respect to the rules of civil procedure, and "misunderstood" and is "factually mistaken" with respect to the nature of his case. In essentially accusing the Court in being derelict in its duty, the plaintiff bases his argument on allegations that are raised for the first time in his motion to alter judgment. These allegations were not before the Court when it ruled on the City's

motion and are not now properly before the Court. With all due respect, it is the plaintiff that is confused about the nature of his case, not this Court.

Plaintiff also cites for the first time *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). The Court did not cite this case in its Memorandum and Order because the nature of plaintiff's complaint and his response to the City's motion to dismiss did not require it. Were the nature of plaintiff's allegations such that the Court would need proof that the City's attempted exaction is related to the impact the proposed development is expected to have in the area where plaintiff's property is located (*i.e.* in a way that exhibits "rough proportionality," *Dolan*, 114 S.Ct. at 2319), then the Court would have considered applying *Dolan* to this case.[1] However, plaintiff specifically represented to the Court that "there is no contemplated future use of the Plaintiff's property which changes its present and past use," and that "the use will not change under the present circumstances until there is destruction of the premises, or a purchaser wishes to buy the commercial property at commercial values for a similar use to which it has been used for twenty years." Plaintiff's Brief in Support of Response to City's Motion to dismiss, at 7. Plaintiff thus is enjoying the full use of his property in the manner in which it has always been used. In this regard, plaintiff never alleged that he is contemplating selling his property or that he has attempted to sell his property but

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[1] For an explanation of *Dolan*, *see* Nicole M. Lugo, Note, *Dolan v. City of Tigard: Paving New Bicycle Paths Through the Thickets of the Fifth Amendment's Takings Clause*, 48 Ark.L.Rev. 823 (1995).

is unable to find a buyer because of the City's refusal to rezone his property.

IT IS THEREFORE ORDERED that plaintiff's motion to alter judgment be and it hereby is denied.

Dated this 25th day of October 1995.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHARLES GOSS,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. LR-C-95-180
	*	
CITY OF LITTLE ROCK,	*	
	*	
Defendant.	*	

MEMORANDUM AND ORDER

(Filed Feb. 20, 1997)

This case involves a zoning dispute between plaintiff Charles Goss and defendant City of Little Rock ("City"). Plaintiff filed this lawsuit on March 20, 1995, alleging that the City conditioned its approval of his rezoning request on his dedication of a portion of his property, thus violating the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, § 22 of the Arkansas Constitution. The City subsequently filed a motion to dismiss. By Memorandum and Order dated September 25, 1995, this Court granted the City's motion, primarily on the basis of plaintiff's representation to this Court that he had no intention of changing the manner in which he has used his property for over twenty years and because he did not claim he was attempting to sell the property. Thus, the Court reasoned, because plaintiff could continue to use his property in the same manner in which it had always been used, and because that was in fact his stated intention, he had not been harmed by the failure of

the City to rezone his property. The Court of Appeals for the Eighth Circuit, however, reversed this Court's decision. *Goss v. City of Little Rock*, 90 F.3d 306 (8th Cir. 1996) ("*Goss*"). Noting that the plaintiff was attempting to sell his property and that such sale was contingent upon rezoning (which had not been disclosed to this Court when it ruled on the City's motion to dismiss), the Eighth Circuit concluded as follows:

> Given that the allegation of facts might entitle relief in this case, dismissal of this action was inappropriate. The record suggests that Little Rock's staff based its condition on a concern that a different, heavy traffic-producing business could be erected on the property if rezoned. [FN3] The sparsity of the record, however, does not permit an inquiry by this court into the existence of the required nexus or, if a nexus exists, whether the demanded dedication bears some rough proportionality to the projected impact of the proposed rezoning. Therefore, we reverse the district court's dismissal and remand it for further proceedings consistent with this opinion.

Id. at 310 (footnote 3 omitted).

In accordance with the decision of the Eighth Circuit, the matter was tried to this Court on January 13-14, 1997. This Memorandum and Order constitutes the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.[1]

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[1] The Court is writing this Memorandum and Order without benefit of a transcript.

I. *Findings of Fact*

Plaintiff is the owner of real property located on Stagecoach Road, also known as State Highway No. 5, in Pulaski County, Arkansas. Plaintiff operates a small commercial business on the property consisting of a convenience store, gas station, laundromat, and car wash, and has operated this business for over twenty years. Under the City's ordinances, plaintiff's business would be classified as a commercial business appropriate for "C-3" general commercial district zoning.

Plaintiff's property originally was in an unincorporated area of Pulaski County. In 1985 the City annexed this area, including plaintiff's property, and zoned the area as "R-2" single family residential district. Although plaintiff's property has been zoned residential since the annexation, he has operated his business continuously since that time as a non-conforming use.

In April of 1993, plaintiff petitioned the City to have his business area rezoned to "C-3" zoning, which would be consistent with the manner in which the property was already being used. Plaintiff originally petitioned to have his property rezoned to "C-4" zoning (the most intense of the commercial zoning classifications) but later downgraded his request to "C-3" zoning after the City planning staff stated that they would recommend against rezoning the property to "C-4" but would support a change to "C-3" zoning. There was nominal opposition to plaintiff's application in the form of two letters and two phone calls.

In seeking to have his property rezoned, plaintiff concealed from the City the fact that he was attempting to

sell his property and that a purported verbal offer by his son and a business associate to buy the property for $515,000 was contingent upon rezoning. In this regard, plaintiff states that he misrepresented on his application form provided by the City the true reasons for which he was seeking rezoning.

On May 24, 1993, the City, through its staff and Planning Commission, reviewed the application and agreed to recommend to the City Board of Directors that the area be rezoned to a "C-3" general commercial district. This recommendation was conditioned, however, upon the plaintiff dedicating to the City a portion of his property as an additional right-of-way to Highway No. 5 for future expansion. The demanded dedication ran the entire length of plaintiff's property (633.68 feet) and 55 feet into the lot. However, because plaintiff's property line extended to the centerline of the highway, 30 of the 55 feet at issue was already used by the public and could not be utilized by plaintiff, regardless of the zoning classification.[2] Thus, instead of a 55 foot dedication, the requested dedication amounted for all practical purposes to 25 feet.[3]

Plaintiff objected to the required dedication and requested that the application be submitted to the Board of Directors as originally prepared. Plaintiff's request was granted and the application was submitted to the Board

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[2] 30 feet on each side of the center-line of Highway No. 5 is a public prescriptive easement.

[3] The City staff later recommended a dedication of 50 feet from the center-line instead of 55 feet, thus amounting to a requested dedication of 20 feet.

on February 21, 1995. The Planning Commission and the City's staff recommended to the Board that the rezoning as requested in the application be approved, but that plaintiff's requested waiver of the condition requiring dedication of 55 feet of plaintiff's property for future public use as a road right-of-way be denied.

On February 21, 1995, the Board of Directors refused to rezone the property to "C-3" zoning without the dedication of the 55 feet for possible future expansion of Highway No. 5 on grounds that the City Treasury would otherwise have to pay condemnation damages. Plaintiff claims in his complaint that the Board took this action even though his application (which, as previously noted, was not completely accurate) and all the proof reflected that there was no contemplated change of the use of his property for general commercial purposes and there was no anticipated change that would increase traffic on Highway No. 5 as a result of the requested rezoning. Plaintiff did not pursue the matter in state court.

On March 20, 1995, plaintiff filed this lawsuit, asserting that the City's requirement of a dedication of real property as a condition of rezoning for continued use identical to the nonconforming use violates the Fifth and Fourteenth Amendments to the United States Constitution, and violates Article 2, § 22 of the Arkansas Constitution. Plaintiff seeks an injunction to rezone the property in accordance with "C-3" zoning, without the dedication to the City of any property rights, as well as punitive damages and attorney's fees.

On October 1, 1995, after this Court ruled in favor of the City on its motion to dismiss but prior to issuing a

ruling on plaintiff's motion to alter judgment, plaintiff entered into a written lease agreement with his son whereby he would receive 10% of the net profits of the property, which amounts to well over $7,000 per year.

II. *Conclusions of Law*

A.

As previously noted, the Eighth Circuit found that the City's staff appeared to base its condition for rezoning on a concern that a different, heavy traffic-producing business could be erected on the property if rezoned. *Goss*, 90 F.3d at 310. Relying on *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994) ("*Dolan*"), the Eighth Circuit remanded to this Court for development of the record with respect to the existence of the required nexus or, if a nexus exists, whether the demanded dedication bears some rough proportionality to the projected impact of the proposed rezoning. *Id.* The Court has carefully considered the matter and concludes that there exists the required nexus between the rezoning to "C-3" and the requested dedication but that the City has not established that the condition bears "rough proportionality" to the projected impact of the plaintiff's request.

1.

There is no question that there exists a nexus between the demanded dedication and the City's concern that a different, heavy traffic-producing business could be erected on plaintiff's property if rezoned and later result in the City Treasury having to pay condemnation

damages. Although plaintiff states that the City took this action even though there was no contemplated change of the use of his property for general commercial purposes or any anticipated change that would increase traffic on Highway No. 5, the "C-3" zoning requested by plaintiff allows 81 uses by right and 24 conditional uses by permit. Concern for the public welfare from traffic congestion and inadequate infrastructure as a result of a commercial enterprise constitutes a legitimate public interest as does concern for taxpayer funds in the City treasury that would be impacted as a result of condemnation damages.[4]

2.

Having determined that the required nexus exists, the Court must now determine whether the City has established that the condition bears "rough proportionality" to the projected impact of plaintiff's requested rezoning. Preliminary to this determination, the Court must address the City's claim that *Dolan* has no application to the issues in this case.

The Eighth Circuit essentially found that the City's action, rather than a mere refusal to rezone, was an adjudicative decision to condition plaintiff's application upon a dedication of a portion of his property, thus placing the burden upon the City to demonstrate that the

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[4] During the February 21 Board meeting, there was discussion among some of the Board members that if plaintiff were allowed to waive the right-of-way, other commercial developments would not be required to dedicate a right-of-way, the resulting costs being borne by the taxpayers.

degree of the extractions demanded in the condition bears "rough proportionality" to the projected impact of the applicant's request. *Goss*, 90 F.3d at 309 n.2 (citing *Dolan*, 114 S.Ct. at 2318-20). Notwithstanding the Eighth Circuit's findings, the City contends that there are significant differences between *Dolan* and this case, in that *Dolan* concerned an adjudicative decision about a dedication imposed as a condition of an approved building permit, whereas this case involves a legislative decision constituting a denial of rezoning in which dedication was discussed but no dedication was imposed. *See* City's Pretrial Brief, at 11. The City goes on to state that a *Dolan* analysis is not required in cases where no dedication is imposed by the City, the rezoning sought is denied, and there is a valid, nonarbitrary and rational basis for the City's denial irrespective of the dedication condition. *See* City's Proposed Findings of Fact and Conclusions of Law, at 8. Although the City was allowed an opportunity to establish in the record that its action in refusing to rezone plaintiff's property was a legislative act, thereby subject to the less demanding rational basis test, this Court, irrespective of any merit the City's arguments may otherwise have, is bound by the Eighth Circuit's conclusion that the City's action was in fact adjudicative in nature and governed by the "rough proportionality" test set forth in *Dolan*. As to whether the City has met its burden of demonstrating "rough proportionality," the Court finds that it has not.

The City acknowledges that prior to the filing of this lawsuit, no traffic impact studies were made with respect to plaintiff's property and that it did not conduct a study of the valuation of the right-of-way. With respect to those

studies that were later conducted to assess traffic flow, the City states that the traffic count at which it arrived (based on a 24-hour period), was in anticipation of a future strip center development and the traffic that such a development could "conceivably" generate. The City used this measurement even though there are no current plans to widen Highway No. 5 and it does not know when or if in the future the highway might be widened.

The Court finds the City's assessment of plaintiff's property to be deficient under *Dolan*. Although no precise mathematical calculation is required, the City must make some effort to quantify its findings in support of the dedication of the right-of-way beyond guessing what some future development could "conceivably" generate. *Dolan*, 114 S.Ct. at 2322. The City must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development," *i.e.* that there is "rough proportionality." *Id.* at 2319-20. The assessment conducted by the City in this case, based as it was on the potential traffic burden with respect to possible or conceivable uses of the property under "C-3" zoning, is entirely too speculative and amorphous to constitute such an individualized determination. The City simply has not established that the rezoning of plaintiff's property to "C-3" zoning will have an adverse impact on the City's admittedly legitimate interest in controlling traffic congestion in commercial areas. Indeed, in footnote 3 of the *Goss* opinion, the Eighth Circuit, citing a district court case, *W.J. Jones Ins. Trust v. Fort Smith, Ark.*, 731 F.Supp. 912, 914 (W.D.Ark. 1990), strongly indicated that because the current use of plaintiff's property is "C-3," the City's claim

that a different "C-3" business, developed in place of the present enterprise, might add to the traffic burden would most likely fail. *Goss*, 90 F.3d at 310 n.3.

Consistent with the findings of the Eighth Circuit and the evidence adduced during the trial, this Court concludes that the City has not met its burden of demonstrating that the degree of the extractions demanded in the condition bears "rough proportionality" to the projected impact of the plaintiff's request. Therefore, the City is obligated to rezone plaintiff's property in accordance with "C-3" zoning, without the dedication to the City of any property rights. However, the plaintiff or his successors in interest will still be subject to the City's ordinances with respect to zoning and building permits. At some time in the future, the City may condition issuance of a building permit upon dedication of the City can establish the "rough proportionality" required by *Dolan*.

B.

There remains the question of plaintiff's claim for damages. Plaintiff states he has been damaged by the City's "malicious intentional conditioning of his rezoning request upon the dedication of 22% of his property" in that he "has been unable to sell his property although he has had two offers for $515,000. . . . " *See* Plaintiff's Pretrial Brief, at 8.[5] Although the Court has concluded that

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[5] In his complaint, plaintiff does not specifically seek any damages for his inability to sell his property, but only asks for unconditional rezoning of his property to "C-3", punitive damages, and attorney's fees. With respect to attorneys' fees,

the City is obligated to rezone plaintiff's property in accordance with "C-3" zoning, without the dedication to the City of any property rights, the Court finds that plaintiff has not been harmed by the actions of the City in this matter and, therefore, is not entitled to an award of damages. Even assuming plaintiff has been harmed by the actions of the City, the Court finds that he is estopped from recovering damages for such harm.

1.

Plaintiff does not claim nor was there any evidence of a diminution in the economically viable use of his property as a result of the City's denial of his rezoning request[6] or that the City has prevented him from using his property in the same manner in which it has always been used. In fact, the testimony of Richard Stephens, an expert in real estate appraisal, established just the opposite. Mr. Stephens testified that not only was there no decline in the value of plaintiff's property as a result of the City's denial of plaintiff's rezoning request, but that rezoning plaintiff's property to "C-3" would enhance the market value of the property by an amount roughly equal to the value of the strip of frontage the City sought to

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plaintiff claims that he "has incurred approximately $25,000 in attorney's fees and costs in pursuing this action." *See* Plaintiff's Pre-trial Brief, at 8. Plaintiff's request for attorney's fees will be discussed in section II(B)(6) of this Memorandum and Order.

[6] Indeed, plaintiff was able to find a lessee for the property when he decided he was no longer interested in operating the business.

exact with the rezoning. Plaintiff introduced no evidence that would contradict the testimony of Mr. Stephens and, in fact, admitted that he has not had the property appraised and does not know its market value.[7] Moreover, in downgrading his request for rezoning from the "C-4" classification, plaintiff could have applied for a "Planned Commercial Development" ("PCD") classification instead of insisting on "C-3" zoning. Such a classification would have removed the non-conforming designation from plaintiff's property and allowed him to sell the property as is and to rebuild the business in the same manner as it currently existed if it were somehow damaged or destroyed. Thus, even without "C-3" zoning, plaintiff would have received all the relief he claims he seeks with a PCD classification. Accordingly, the Court finds that plaintiff has not demonstrated any harm as a result of the City's refusal to rezone his property.

2.

Nor is plaintiff entitled to damages as a result of his being unable to sell his property. Although plaintiff claims he had two offers on his property for $515,000 that were contingent on rezoning (one of these offers was from his son and the other was a joint offer from his son and a business associate), these offers were not evidenced by any writings. Plaintiff is essentially asking this Court

[7] The Court notes that plaintiff would not allow Mr. Stephens to enter the buildings on his property. To the extent plaintiff disputes the testimony of Mr. Stephens, the Court finds that he is estopped from claiming that the appraisal was not full and accurate.

to award him damages for the City's interference with the sale of his land when there was no enforceable contract under Arkansas' statute of frauds and he himself would be unable to recover damages for any breach the prospective buyers may have committed.[8] There being no enforceable contract, plaintiff is not entitled to an award of damages from the City as a result of his being unable to consummate any sale of his property without rezoning to "C-3." Even if plaintiff had an enforceable contract for the sale of his property, he concealed from the City the existence of such contract and thereby prevented the City from specifically ascertaining or considering any ramifications to the sale of his property that might result from their refusal to rezone plaintiff's property. Plaintiff is therefore estopped from recovering damages for such harm. *See* Section II(B)(4) of this Memorandum and Order.

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[8] Arkansas' statute of frauds provides that, in the absence of a writing signed by the party to be charged, no action shall be brought to charge any person upon any contract for the sale of lands or any interest therein. Ark. Code Ann. § 4-59-101(a)(4) (Repl. 1996). Although an oral agreement may be removed from the statute of frauds by proving both the making of an oral contract and its performance by clear and convincing evidence, *see Langston v. Langston*, 625 S.W.2d 554 (Ark. App. 1981), no such evidence was introduced in this case. The operation of the business on the property by plaintiff's son is not unequivocally referable to the contract, as plaintiff's evidence established that the son is leasing the business. Furthermore, plaintiff's son is not in exclusive possession of the premises as plaintiff continues in possession of the property.

3.

Plaintiff's claim of entitlement to punitive damages is likewise without merit. Even if punitive damages could be awarded against a municipality in circumstances such as these, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (case under 42 U.S.C. § 1983 in which Supreme Court found that considerations of history and policy do not support exposing a municipality to punitive damages for the bad faith actions of its officials), plaintiff has not presented any evidence whatsoever that the City's conditioning of his rezoning request upon a dedication of a right-of-way was "malicious" or otherwise in bad faith. Plaintiff is therefore not entitled to punitive damages.

4.

To the extent plaintiff can be said to have been harmed by the City's actions, the Court finds that he is estopped from recovering damages for such harm. Plaintiff is attempting to hold the City liable for harm he claims he suffered as a result of his being unable to sell his property when he concealed from the City that he was attempting to sell his property (such concealment continuing through much of the proceedings in this Court prior to appeal[9]). Plaintiff is not entitled to claim damages to the detriment of the City when the latter was

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[9] It was only in plaintiff's motion to alter judgment that the nature of the business plaintiff is operating was disclosed and that he was seeking rezoning in conjunction with the sale of his property and business.

entitled to rely upon his representations and acted or failed to act accordingly. *Cf. Ferguson v. Unionmutual Stock Life Ins. Co. of America*, 501 F.Supp. 247, 250 (E.D.Ark. 1980) (noting that the doctrine of equitable estoppel prevents a party, who has failed to act, from claiming a right to the detriment of his adversary when the latter was entitled to rely upon his affirmative action and has acted or failed to act accordingly), *aff'd*, 673 F.2d. 253 (8th Cir. 1982). Specifically, plaintiff allowed the City to pursue a course of action which led to the filing of this lawsuit knowing all along that the City was unaware of the true nature of his claim. By misrepresenting the nature of his claim, plaintiff prevented the City from specifically ascertaining or considering any ramifications to the sale of his property that might result from their refusal to rezone plaintiff's property. The Court finds that plaintiff's conduct surrounding his efforts to get his property rezoned precludes him from claiming damages as a result of the City's refusal to rezone his property. *Cf. Meers v. Tommy's Men's Store, Inc.*, 320 S.W.2d 770, 772 (Ark. 1959) (Lessor was equitably estopped from availing himself of forfeiture in lease regarding unauthorized improvements to property where, by his words and conduct, he caused his lessees to believe that he would not enforce forfeiture; court noted that lessor "stood silently by" and made no complaint while improvements were being made by lessee "and we think his complaint now comes too late").

5.

Strictly as an alternative holding for purposes of appeal, the Court finds that plaintiff's damages for the inability to sell his property without rezoning to "C-3"

(should it be determined that plaintiff has in fact been harmed by the actions of the City) is $265,000, the difference between the purchase price of $515,000 that plaintiff states he would have received from his son for the sale of his property and the proceeds due under the terms of the lease agreement.[10]

6.

One final matter concerns plaintiff's request that he be reimbursed for the "approximately" $25,000 in attorney's fees he claims he has incurred as a result of the City's actions. Although neither the City nor the plaintiff has addressed the legal underpinnings of this issue, the Court has nevertheless considered the matter and finds that plaintiff is not entitled to an award of attorney's fees for the success he has achieved in this lawsuit.

The statutory basis upon which plaintiff seeks an award of attorney's fees is not at all clear from the complaint as is evident from plaintiff's jurisdictional statement:

> That Plaintiff pleads jurisdiction lies under 28 U.S.C. § 1331, in that a Federal Law question arising under the Constitution Laws of the United States is involved. The Plaintiff asserts that his Constitutional rights under United States Constitutional Amendments 5 and 14, have been violated. And See: *William J. (Jack) Jones Insurance Trust, et al, Plaintiff v. The City of*

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[10] These figures were not controverted by the City.

Fort Smith, A Municipal Corporation, Defendant. 731 F.Supp. 912 (1990).

Complaint, ¶ 1.

Notwithstanding plaintiff's failure to indicate the statutory basis for an award of attorney's fees, it is clear that this case is not a 42 U.S.C. § 1983 action or a civil rights action which might give rise to an award of attorney's fees under 42 U.S.C. § 1988, *cf. Olivieri v. Ward*, 637 F.Supp. 851, 878 (S.D.N.Y. 1986) (section 1988 does not specifically provide for attorney fees to prevailing parties in claims under the constitution generally) (subsequent history omitted), and plaintiff has not cited this Court to any other authority which would provide for an award of attorney's fees under circumstances such as these. In this regard, the American rule on the award of attorney's fees in federal litigation is well-settled in its requirement that, absent a statute or an enforceable contract, each party is responsible for its own fees. *Lamb Engineering & Constr. Co. v. Nebraska Public Power District*, ___ F.3d ___, 1997 WL 6112, at *10 n. 14 (8th Cir. Jan. 9, 1997) (citations omitted).[11]

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[11] In paragraph 10 of his complaint, plaintiff briefly refers to Article 2, § 22 of the Arkansas Constitution in support of his claim that compensation be paid to any individual whose property is confiscated by the State for public use. To the extent plaintiff is relying on Article 2, § 22 of the Arkansas Constitution as a basis for an award of attorney's fees, his claim must fail as attorney's fees are not generally recoverable under those provisions. *See Arkansas State Highway Commission v. Johnson*, 780 S.W.2d 326, 331 (Ark. 1989) ("[a]lthough we agree the provisions of Ark. Const. art. 2, § 22, constitute a strong exhaltation [sic] of the right of property in this state, the right of

It is of course true that attorney's fees may be awarded to a prevailing party when a suit is brought under § 1983. *Reel v. Arkansas Department of Correction*, 672 F.2d 693, 697 (8th Cir. 1982). However, § 1988 does not by its terms confer subject matter jurisdiction upon federal courts, but rather relies upon the provisions of other federal statutes, such as § 1983 read in conjunction with 28 U.S.C. § 1343 (civil rights and elective franchise statute). *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990). Although plaintiff's claims might otherwise have fallen within the scope of § 1983, *see; e.g., Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1147 (8th Cir.) (violations of the Fourteenth Amendment, including those which involve the deprivation of property, are within the ambit of § 1983), *cert. denied*, 469 U.S. 834 (1984), and *Roy v. City of Little Rock*, 902 F.Supp. 871, 876 n.9 (E.D.Ark. 1995) (Fifth Amendment takings claim is cognizable under § 1983), this is not a lawsuit brought to enforce a provision of § 1983 (or any other statute for that matter) but is one brought directly under the Fifth and Fourteenth Amendments to the Constitution. Indeed, plaintiff's complaint does not even refer to 28 U.S.C. § 1343(3), the "jurisdictional counterpart" of § 1983, *see Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 (1972), but only asserts federal question jurisdiction under 28 U.S.C. § 1331. This is thus not one of those cases in which a plaintiff has specifically asserted § 1983 as a cause of action but prevailed on a different claim that was joined

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property comes in many different forms, and we are not prepared to hold attorneys' fees are recoverable to protect any particular one in the absence of an authorizing statute").

with § 1983. *See, e.g., Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1141-42 (the fact that a party prevails on a ground other than § 1983 does not preclude an award of attorney's fees under § 1988; if § 1983 would have been an appropriate basis for relief, then attorney's fees may be awarded under § 1988 even though relief was actually awarded on another ground); *Maher v. Gagne*, 448 U.S. 122, 132 n. 15 (1980) (finding that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim upon which the plaintiff prevailed is one for which fees cannot be awarded under the Act); *Smith v. Robinson*, 468 U.S. 992, 1002 (1984) (noting "the general rule that when the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate").[12] In this case, plaintiff's complaint makes no reference whatsoever to § 1988, § 1983, or even the language of § 1983, and cannot therefore be found to fall within the rubric of § 1988. *See North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 12 and 15 (1986) ("[u]nder the plain language and legislative history of § 1988 . . . only a court in an

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[12] Allowing fees to a plaintiff in such cases "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." *Maher v. Gagne*, 448 U.S. at 133. *See also Smith v. Robinson*, 468 U.S. at 1077 ("Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive").

action to enforce one of the civil rights laws listed in § 1988 may award attorney's fees . . . [t]he case before us is not, and was never, an action to enforce any of these laws"). Plaintiff is thus not entitled to an award of attorney's fees under § 1988, *see Olivieri v. Ward*, 637 F.Supp. at 878, and he has not set forth any other basis upon which such an award may be predicated. *Cf. Seaway Drive-In, Inc. v. Township of Clay*, 791 F.2d 447, 450 (6th Cir.), *cert. denied*, 479 U.S. 884 (1986) (noting that "[h]ad appellant not asserted a section 1983 claim, but instead asserted only the state law claims, or a federal law claim that is not listed in section 1988, and prevailed it would not have been entitled to attorney's fees); *Premachandra v. Mitts*, 753 F.2d 635, 637 (8th Cir. 1985) (case under 28 U.S.C. § 2412 and Fifth Amendment in which Court held that fees may not be awarded under § 1988 to a party who prevails on a Fifth Amendment claim simply because the claim is analogous to one which could possibly have been raised under § 1983) (en banc).[13] Accordingly, plaintiff's

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[13] *But cf. Americans United For Separation of Church and State v. School District of City of Grand Rapids*, 835 F.2d 627, 631 (6th Cir. 1987) (where complaint employed language of § 1983 and asserted jurisdiction under § 1343, court held that the mere failure to plead or argue reliance on § 1983 is not fatal to a claim for attorney's fees if the pleadings and evidence present a substantial Fourteenth Amendment claim for which § 1983 provides a remedy, and this claim is related to plaintiff's ultimate success); *Armstrong v. Fairmont Community Hosp. Ass'n*, 684 F.Supp. 1486 (D.Minn. 1987) (where complaint cited § 1988, employed language of § 1983, and asserted jurisdiction under § 1343, court, relying on cases in which § 1983 was specifically asserted as a cause of action, held that § 1988 applies to all types of § 1983 actions, whether or not § 1983 is specifically asserted in the complaint).

request for attorney's fees is hereby denied. *See Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975).[14]

III. *Conclusion*

Pursuant to the Eighth Circuit's opinion in *Goss*, the Court concludes that the City is obligated to rezone plaintiff's property in accordance with "C-3" zoning, without the dedication to the City of any property rights, but that the plaintiff is not entitled to an award of damages.

IT IS SO ORDERED this 20th day of February 1997.

/s/ Susan Webber Wright
UNITED STATES DISTRICT JUDGE

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[14] Even if plaintiff were entitled to attorney's fees, the record as it now stands is insufficient to make such an award. Plaintiff would have to submit appropriate documentation before this Court could assess the reasonableness of the fees requested. The Court would note also that at least a portion of the attorney's fees plaintiff claims he incurred might have been avoided had he been forthcoming with both the City and this Court regarding the nature of his claim.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHARLES GOSS,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. LR-C-95-180
	*	
CITY OF LITTLE ROCK,	*	
	*	
Defendant.	*	

ORDER

(Filed May 13, 1997)

Following a court trial on January 13-14, 1997, this Court, by Memorandum and Order dated February 20, 1997, issued findings of fact and conclusions of law holding that the City of Little Rock ("City") is obligated to rezone plaintiff's property in accordance with "C-3" zoning without the dedication to the City of any property rights, but that the plaintiff is not entitled to an award of damages, either compensatory or punitive, and is not entitled to an award of attorney's fees. The matter is now before the Court on motion of the plaintiff to alter or amend judgment [doc.#48] and motion of the plaintiff for attorney's fees and costs [doc.#'s 50 & 51]. The City has responded in opposition to these motions. Having carefully considered the matter, the Court finds that plaintiff's motion to alter or amend judgment and his motion for attorney's fees should both be and hereby are denied, and that his motion for costs should be and hereby is granted in part and denied in part.

I.

In support of his motion to alter or amend judgment, plaintiff characterizes this Court's decision as holding that "because the Plaintiff did not tell the City exactly why he wanted to retain his constitutional rights, the Plaintiff should not be allowed any compensatory damages or attorney's fees." Brief in Support of Motion to Alter or Amend Judgment, at 1. Plaintiff's characterization of this Court's decision reflects an apparent misunderstanding on his part. It is true that the Court described plaintiff's failure to disclose to the City that he was seeking rezoning in conjunction with the sale of his property as "concealment." The Court did so because plaintiff himself testified that he was attempting, purportedly for business reasons, to keep the pending sale of his property secret and that he thus indicated on the application form provided by the City that he was seeking rezoning to conform his property to that for which it was already being used when he actually was seeking rezoning in order to sell his property. Nevertheless, the reason the Court denied plaintiff compensatory damages and attorney's fees was not because of plaintiff's concealment, but because the Court found that (1) plaintiff had not been harmed by the actions of the City and, therefore, was not entitled to compensatory damages, and (2) there was no statutory basis upon which to predicate an award of attorney's fees and the "American rule" on the award of attorney's fees thus dictated that each party in this case be responsible for its own fees. The Court's discussion of plaintiff's concealment concerned an *alternative* holding that *even if he were* harmed by the actions of the City, he is estopped from recovering compensatory damages due to

his concealment from the City that he was seeking rezoning in conjunction with the pending sale of his property.[1] In any case, having clarified the basis of its decision, the Court will address each of plaintiff's arguments in support of his motion to alter or amend judgment.

A.

Plaintiff states that irrespective of the City being unaware of the pending sale of his property when it initially rendered its decision, the City was nevertheless apprised of such sale on October 5, 1995 (apparently after plaintiff disclosed this fact in his motion for reconsideration following the Court's granting of the City's motion to dismiss) and still chose not to grant his rezoning request after that date. Plaintiff states that such failure to grant his rezoning request at any time after October 5, 1995 indicates that regardless of the existence of the contract for the sale of his property, the City was knowingly unwilling to lift the unconstitutional condition for any reason.

The Court does not find the City's failure to grant plaintiff's rezoning request following the filing of his motion for reconsideration in October 1995 to be evidence of the City's unwillingness to grant his request. Plaintiff's disclosure that he had a pending sale for his property came well after the City had rendered its decision on plaintiff's request, after this lawsuit had been filed, and after this Court had issued an order dismissing plaintiff's lawsuit. There is nothing in the record indicating that

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[1] The matter of attorney's fees is a separate issue entirely.

plaintiff resubmitted his request for rezoning during this time period (as opposed to or in conjunction with pursuing the matter on appeal), and considering the circumstances under which the City was ultimately apprised of the pending sale, it is neither surprising nor legally significant that the City failed to *sua sponte* revisit plaintiff's initial application for rezoning after October 5, 1995. Plaintiff's argument on this point provides no basis for altering or amending the Court's judgment.

B.

Plaintiff also states that the existence of the contract for the sale of his property and its terms was proven by the testimony of all three parties to the contract, and that the conclusion of this Court that the contract is unenforceable is simply without merit and does not justify denying him compensatory damages. The Court would note, however, that in response to questioning from the City, plaintiff himself acknowledged knowing that verbal contracts of the type at issue in this case were unenforceable and that he was "trusting" the potential buyers. Notwithstanding plaintiff's trust, this Court finds the contract unenforceable under Arkansas' statute of frauds, Ark. Code Ann. § 4-59-101. The evidence in the record permits no other conclusion. Accordingly, this argument provides no basis for altering or amending the Court's judgment.

C.

With respect to this Court's alternative holding that plaintiff is estopped from recovering compensatory damages, plaintiff states that a person's constitutional right to

just compensation for property taken by a public entity is not dependent upon his reasons for desiring a constitutional right guaranteed by the U.S. Constitution and, that, "[i]n fact, no American ~~case law exists~~ whereby a citizen must express his reasons for wanting his constitutional rights in order to enjoy constitutionally protected rights." Brief in Support of Motion to Alter or Amend Judgment, at 3. The Court will only note as it did in its Memorandum and Order that by concealing the true reasons for which he was seeking rezoning, plaintiff deprived the City of an opportunity to consider his application in light of all relevant circumstances. While plaintiff is correct that a board member expressed concern that the City's refusal to rezone might impact upon plaintiff's ability to sell his property, such a concern by a single board member cannot be imputed to the entire Board nor can it in any case be considered notice of a pending sale. The Court would note also that such concern may have carried the day if the Board as a whole had been informed that the sale of plaintiff's property was in fact what was at isssue [sic]. As it was, however, both the Board and this Court were operating under the mistaken assumption that plaintiff's intention was to continue to use his property in the same manner in which it had always been used, irrespective of whether his property was rezoned in accordance with "C-3" zoning. Plaintiff thus deprived the City of relevant information in considering his application and this Court finds that he is thereby estopped

from claiming compensatory damages for the City's failure to grant his application.[2]

D.

For the foregoing reasons and for the reasons set forth in its Memorandum and Order, the Court finds that plaintiff has not been harmed by the actions of the City and, thus, is not entitled to compensatory damages. Alternatively, to the extent that it can be said plaintiff has suffered compensable injury, the Court finds that he is estopped from recovering such damages.

II.

A.

Plaintiff also asks that this Court alter or amend its judgment denying him attorney's fees. In its Memorandum and Order, the Court found that because plaintiff was not proceeding under 42 U.S.C. § 1983 or any other statute that would provide for an award of attorney's fees, each party to this litigation was responsible for its own fees in accordance with the American rule on the award of attorney's fees. In his motion to alter or amend judgment, plaintiff acknowledges not proceeding under § 1983, but states that his case is clearly one for which he "could" have filed pursuant to § 1983 and that he should thus not be "penalized" for failing to plead § 1983 in his complaint. The Court rejects this argument.

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[2] Of course, this finding is only relevant if it is determined that plaintiff has in fact suffered compensable injury as a result of the City's actions.

As noted in its Memorandum and Order, the Court agrees with plaintiff that this case is one which could have been brought under § 1983. In fact, the Court will go one further and state that the proof as presented at trial was such that the elements necessary for a § 1983 claim (had such a claim been asserted) were established by the plaintiff, albeit unwittingly.[3] Nevertheless, the fact remains that this case was never a lawsuit brought to enforce a provision of § 1983 or any other statute but is one brought directly under the Fifth and Fourteenth Amendments to the U.S. Constitution. Other than the cases cited and distinguished by this Court, plaintiff has not cited any authority for the proposition that fees may be awarded under 42 U.S.C. § 1988 to a party who prevails on a constitutional claim simply because the claim is analogous to one which could have been raised under § 1983. The Court thus rejects plaintiff's assertion that this Court is "penalizing" him for failing to plead a § 1983

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[3] Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law . . . " 42 U.S.C. § 1983. Therefore, in order to state an actionable claim under § 1983, a plaintiff must show (1) that the conduct complained of has been committed under color of state law, and (2) that this conduct worked a denial of a right secured by the Constitution or laws of the United States. *See generally West v. Atkins*, 487 U.S. 42, 48 (1988); *Martinez v. Colon*, 54 F.3d 980, 984 (1st Cir.), *cert. denied*, 116 S.Ct. 515 (1995); *Lesher v. Reed*, 12 F.3d 148, 150 (8th Cir. 1994); *Jones v. Gutschenritter*, 909 F.2d 1208, 1211 (8th Cir. 1990).

cause of action. Having said that, the Court acknowledges that plaintiff's position on this issue cannot be characterized as frivolous and that his reading of the cases may indeed be the correct one. *See* Memorandum and Order, at 20 n.13. This is a debatable issue and one the Court regards as appropriate for resolution by the Eighth Circuit. In the meantime, the Court finds that plaintiff is not entitled to an award of attorney's fees and that his motion seeking same must be denied.

B.

Plaintiff also criticizes this Court for only citing footnote 14 in *Lamb Engineering & Const. v. Nebraska Public Power*, 103 F.3d 1422 (8th Cir. 1997), in which the American rule on the award of attorney's fees is expounded, while neglecting to note that rule's bad faith exception, which allows courts to assess attorney's fees "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 1435 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). It is true that the Court did not discuss the bad faith exception to the American Rule in its Memorandum and Order. However, the Court did not see a need to engage in such a discussion as it had earlier concluded in section II(B)(3) of its Memorandum and Order that "plaintiff has not presented any evidence whatsoever that the City's conditioning of his rezoning request upon a dedication of a right-of-way was 'malicious' or otherwise in bad faith." Having so concluded, the Court thought the inapplicability of the bad faith exception to this case to be patently obvious. The Court further assumed the inapplicability of the bad faith exception to be obvious since, even if the City's

conduct in denying plaintiff's rezoning request could be characterized as in bad faith, the district court's inherent power to award attorney fees as a sanction for bad faith conduct does not extend to pre-litigation conduct. *Lamb Engineering & Const.*, 103 F.3d at 1437. The alleged bad faith conduct of the City in this case (the conditioning of plaintiff's rezoning request upon a dedication of right-of-way) was clearly part of the underlying substantive claim, or pre-litigation conduct, and does not give rise to application of the bad faith exception to the American rule.[4] The Court thus saw no need to burden its Memorandum and Order with a discussion of matters which, as a matter of law, had no application to this case. Nevertheless, because plaintiff raises the issue and for purposes of appeal, the Court hereby finds that the bad faith exception to the American rule is not applicable to this case.

C.

One final matter concerns plaintiff's motion for an award of costs. Attorney Alice Greene has submitted a time memorandum with her motion reflecting costs in the total amount of $558.63. The Court has reviewed the entries in this time memorandum and must disallow her claim for travel expenses in the amount of $144.02, Federal Express charges in the amount of $71.25, telephone calls in the amount of $3.22, and postage in the amount of $6.77. Absent extraordinary or compelling circumstances

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[4] As previously noted, the Court does not regard the City's failure to *sua sponte* revisit plaintiff's rezoning application after October 5, 1995 to in any way be evidence of bad faith.

(of which none are present here), travel of attorneys is not a taxable cost, *see, e.g., Hollenbeck v. Falstaff Brewing Corp.*, 605 F.Supp. 421, 439 (E.D.Mo. 1984), *aff'd*, 780 F.2d 20 (8th Cir. 1985), and Federal Express charges, long distance telephone charges, and postage expenses are not "costs" as that term is defined in 28 U.S.C. § 1920 but are in fact out-of-pocket expesnes [sic] for which reimbursement is not allowed under these circumstances. *see id.* Accordingly, plaintiff's claim for these expenses must be denied. With respect to the remaining entries in Ms. Greene's time memorandum, the Court does not find these entries to be unreasonable or excessive. Accordingly, the Court finds that Ms. Greene is entitled to an award of $333.37 in costs.

Attorney Charles Brown requests attorney's fees and costs in the total amount of $9,022.50. Although the Court finds that Ms. Greene is entitled to a partial award of costs, the Court declines to make such an award to Mr. Brown as this Court is unable to determine from the records he has submitted what exactly constitutes his costs (if any) and what constitutes his attorney's fees. Mr. Brown's time memorandum is deficient in detailing his costs and the Court therefore declines plaintiff's motion for costs as it relates to Mr. Brown.[5]

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[5] In any case, it would appear that most, if not all, of the costs incurred in this action by both Mr. Brown and Ms. Greene are reflected on the time sheet submitted by Ms. Greene.

III.

For the foregoing reasons, the court finds that plaintiff's motion to alter or amend judgment should be and hereby is denied. Because of the Court's resolution of that motion, plaintiff's motion for an award of attorney's fees is also denied. Plaintiff's motion for costs is hereby granted in part and denied in part.

IT IS SO ORDERED this 13th day of May 1997.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

THIS DOCUMENT
ENTERED ON DOCKET
SHEET IN COMPLIANCE
WITH RULE 58 AND/OR
79(a) FRCP ON 5/14/97
BY VT.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 97-2652/2790EALR

Charles Goss,	*	Order Denying
	*	Petition for
Appellee/Cross-Appellant,	*	Rehearing and
	*	Suggestion for
vs.	*	Rehearing En
	*	Banc
City of Little Rock, Arkansas,	*	
	*	
Appellant/Cross-Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 1, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H

Ark. Const. Art. 2, § 22 (1874)

Property rights – Taking without just compensation prohibited.

The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

Ark. Code Ann. § 18-15-102 (Michie 1987)

Actions against corporations appropriating private property.

(a) Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any real or personal property, the owner of the property shall have the right to bring an action against the corporation in the circuit court of the county in which the property is situated for damages for the appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefore, would be barred by the statute of limitations.

(b) The measure of recovery in the action shall be the same as that governing proceedings by corporations for the condemnation of property.

(c) Proceedings instituted under this section shall be governed by the rules of pleading and practice prescribed for the government of proceedings in the circuit court.

(d) The defendant shall have the right to bring in all parties having or claiming an interest in the property in controversy.

(e) The court shall make the proper orders of the distribution of the compensation recovered in the action among the parties as may be entitled thereto and shall include in the judgment in the proceedings an order condemning the property for the public use to which it may have been appropriated.

APPENDIX I

Minutes
February 21, 1995

The next presentation was a proposed Ordinance, with the title being:

AN ORDINANCE RECLASSIFYING PROPERTY LOCATED IN THE CITY OF LITTLE ROCK, ARKANSAS AND WAIVING THE DEDICATION REQUIREMENT FOR ADDITIONAL RIGHT-OF-WAY, AMENDING SECTION 36 OF THE CODE OF ORDINANCES OF THE CITY OF LITTLE ROCK, ARKANSAS; AND FOR OTHER PURPOSES;

(Z-5671 – Goss Enterprises, Inc./Charles Goss, the applicant, to rezone 6000 and 6024 Stagecoach Road, from "R-2" Single family District to "C-3" General Commercial, and waiver of dedication of additional 25 ft. right-of-way for Stagecoach Road (Ark. State Hwy. No. 5.)

with the Ordinance being read the first time. Mr. Jim Lawson, Director of Neighborhoods and Planning, gave a briefing to the Board, explaining the main issue on this request is the amount of right-of-way that is required. The Master Street Plan standard is 55 feet from the centerline. Staff has worked with the Highway Department and is recommending a 50 ft. right-of-way. Mr. Charles A. Brown, 323 Center Street, Suite No. 720, representing the property owner, Mr. Charles Goss, explained the proposed project saying there was no change in business or traffic. He cited a Fort Smith Court Case and the opinion handed down by the Supreme Court. Mr. Brown said it does not justify any additional burden on the streets and there is no additional cost to the City. He requested the

proposed Ordinance be approved without the requirement of the dedication of the street. In answer to a question by Director Adcock, Mr. Lawson stated the road will have to be widened at some point in time, and what right-of-way the City does not own will have to be purchased at that time. Director Sharp felt the Board should take a close look at this, and said he was going to vote for the waiver; adding, "the man did not ask to be annexed to the City, and this simply is not right." City Attorney Tom Carpenter told the Board the property is zoned residential and is a non-conforming use. He said the question before you is, "whether to take the right-of-way because this is probably the only time you will have a right to request the right-of-way." City Manager Charles Nickerson also agreed that this is the appropriate and only time the Board will have an opportunity to make the right-of-way request. Mr. Lawson answered questions by Board Members. Director Hodges stated the waiver would be setting a very bad precedent, and Director Kumpuris said nothing will happen until the State triggers the action. Directors Sharp and Adcock were opposed to requiring the right-of-way dedication. Following the lengthy discussion, a motion was made by Director Sharp, seconded by Director Kumpuris, that the rules be suspended and the proposed Ordinance be placed on second reading. The motion was unanimously adopted by the Board Members present, being ten in number and two-thirds or more of the members of the Board of Directors-elect, and the second reading of the Ordinance ensued. There was a subsequent motion by Director Adcock, seconded by Director Joyce, to again suspend the rules and place the proposed Ordinance on third and

final reading. The motion was unanimously adopted by the Board Members present, being ten in number and two-thirds or more of the members of the Board of Directors-elect, and there was a third and last reading of the proposed Ordinance. An Aye and No Vote was taken on passage of the Ordinance, with the results recorded as follows: Ayes – Directors Sharp, Adcock and Wyrick – total 3; Noes – Directors Mason, Kumpuris, Hinton, Hodges, Keck, Joyce and Mayor Dailey – total 7; Absent – Director Wilson – total 1. Whereupon, the proposed Ordinance **FAILED TO PASS**.

CERTIFICATE

STATE OF ARKANSAS)
COUNTY OF PULASKI) SS
CITY OF LITTLE ROCK)

I, Robbie Hancock, City Clerk within **and for** the City aforesaid, do hereby certify that the foregoing is a true and correct copy of **the Minutes** of a meeting of the Board of Directors of the City of Little Rock, **Arkansas,** held on **February 21, 1995,** relating to Zoning Case **Z-5671 – 6000 and 6024 Stagecoach Road,** as the same now appear of record in my office in Minute Record A-11, page 42.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office on this 27th day of November, 1996.

[Seal] /s/ Robbie Hancock
CITY CLERK
City of Little Rock, Arkansas